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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

NO. 76-148

B & B CONSTRUCTION COMPANY OF OHIO, INC.

APPELLANT

versus

MASSAR R. RADFORD and THE WORKMEN'S COMPENSATION
BOARD

APPELLEES

APPEAL FROM THE JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, THIRD DIVISION
HON. E. SKILES JONES, JUDGE

BRIEF FOR APPELLEE, MASSAR R. RADFORD

FILED

MAY 5 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

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This is to certify that copies of this Brief have been served upon Honorable Armer H. Mahan, 310 West Liberty Street, Louisville, Ky. 40202 and upon Honorable Charles M. Leibson, successor to Honorable E. Skiles Jones, Courthouse, Louisville, Kentucky 40202 and upon Honorable William L. Huffman, Director, Kentucky Workmen's Compensation Board, Capitol Plaza Tower, Frankfort, KY 40601, pursuant to RAP 1.250 by mailing copies hereof to the addresses above, postage prepaid, this 26th day of April, 1976.


ATTORNEY FOR APPELLEE, MASSAR R. RADFORD

TABLE OF CONTENTS AND AUTHORITIES

	PAGE
COUNTERSTATEMENT OF THE QUESTION PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2-3
A. PROCEEDINGS BELOW	2-3
B. STATEMENT OF THE FACTS	3
ARGUMENT	3-
A. THE WORKMEN'S COMPENSATION BOARD EXERCISED PROPER JURISDICTION IN CON- SIDERING APPELLEE'S MOTION TO REOPEN WHICH WAS FILED AFTER THE COURT OF APPEALS ENTERED ITS MANDATE AND WHERE THE BOARD ENTERED ITS AWARD AFTER THE CIRCUIT COURT ISSUED ITS JUDGMENT IN CONFORMITY WITH THE MANDATE	3-7
RAP 1.340	4
<u>Jerry's Drive In, Inc. v. Young,</u> Ky., 335 S.W.2d 323 (1960)	4
<u>Standard Products Company v. Estes,</u> Ky., 508 S.W.2d 771 (1974)	4
<u>Seidl v. Willen,</u> Ky., 411 S.W.2d 29 (1967)	6
CONCLUSION	7-8

COUNTERSTATEMENT OF THE QUESTION PRESENTED

The issue presented on appeal is correctly stated as follows:

WHETHER THE WORKMEN'S COMPENSATION BOARD HAD JURISDICTION TO CONSIDER AND ENTER AN AWARD ON A MOTION TO REOPEN BY A CLAIMANT WHERE THE COURT OF APPEALS HAD ENTERED ITS MANDATE AND THE AWARD WAS RENDERED SUBSEQUENT TO THE ENTRY OF JUDGMENT BY THE CIRCUIT COURT IN COMPLIANCE WITH THE MANDATE?

THE APPELLEE RESPONDS IN THE AFFIRMATIVE.

SUPREME COURT OF KENTUCKY

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BRIEF FOR APPELLEE, MASSAR R. RADFORD

MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

A. Proceedings Below

Appellee, Massar R. Radford, (hereinafter referred to as "Radford"), agrees with the substance of Appellant's (hereinafter referred to as the "Company") statement of the nature of the proceedings, with one particular exception. The Company states that this case was still pending in the Jefferson Circuit Court when Radford filed his Motion to Reopen the Award to the Board. This Court entered its mandate reversing the Circuit Court and ordering it to enter a judgment conforming with that mandate on July 22, 1975. Radford filed his Motion to Reopen after August 28, 1975. The Company responded to this Motion to Reopen on September 4, 1975.

On September 8, 1975, the Circuit Court entered its judgment in conformity with the mandate of the Court of Appeals.

Finally, on September 22, 1975, the Workmen's Compensation Board entered its order directing the case to be set for hearing on Appellee's Motion to Reopen.

The Company's statement that the case was pending before the Circuit Court is incorrect. As the chronology of events indicate the Motion to Reopen was not filed until after the mandate of this Court had been entered directing a judgment by the Circuit Court and the award of the Board was not rendered until after the Circuit Court had issued its judgment in conformity with the mandate.

B. Statement of the Facts

Appellee, Radford, agrees with the Company's statement of the facts.

ARGUMENT

- A. The Workmen's Compensation Board Exercised Proper Jurisdiction In Considering Appellee's Motion To Reopen Which Was Filed After The Court Of Appeals Entered Its Mandate And Where The Board Entered Its Award After The Circuit Court Issued Its Judgment In Conformity With The Mandate.

The Company contends that when Radford filed his Motion to Reopen the Board did not have jurisdiction to consider the Motion, until the Circuit Court entered its judgment in conformity with the Court of Appeals' mandate.

RAP 1.340 provides, inter alia:

"(a) The mandate is a writ of the Court, issued by the Clerk and directed to the trial court, which makes effective an opinion of the Court in an appealed case. The issuance or recall in such mandate is within the inherent discretion of the Court. . .

(c) Upon issuance of the mandate the Clerk shall forthwith send it to the trial court from which the appeal was taken and a copy thereof to each attorney of record. The Clerk of the trial court shall forthwith file the mandate in the original record and note the filing on the proper docket."

The rules of appellate procedure, civil procedure and the workmen's compensation laws do not limit the jurisdiction of the Board in the manner that the company would have this court limit this jurisdiction. The Motion to Reopen was not filed until after the mandate of this court had been issued. The mandate of the Court clearly affirmed the Board's decision in reversing the Circuit Court. The entry of judgment by the Circuit Court, therefore, in conformity with the mandate, would be merely remedial in nature. The mandate did not require the presentation of new evidence or further proceedings by the Circuit Court other than to issue its judgment affirming the Board's order. Significantly, the Board did not rule on the motion to reopen until after the Circuit Court had entered its judgment in conformity with the mandate of this Court.

The Company cites Jerry's Drive In, Inc. v. Young, Ky., 335 S.W.2d 323 (1960) and Standard Products Company v. Estes, Ky., 508 S.W.2d 771 (1974) in support of its contention here.

Neither of these two cases, however, support the Company's argument that the Board was without jurisdiction to consider Radford's motion to Reopen. In fact, the holdings in both these cases are supportive of the Board's action.

In Jerry's Drive In, Inc., the employer appealed an award of the Workmen's Compensation Board to the claimant. While the appeal was pending, and prior to the issuance of an opinion or a mandate of the Court of Appeals, the employer moved the Board to reopen the award. The Board refused to reopen the award on the basis that it lacked jurisdiction. This Court affirmed the Board's decision to deny jurisdiction in holding that "jurisdiction of the Board was suspended pending the appeal" 335 S.W.2d at 323.

In the instant case, the appeal was no longer pending in the Court of Appeals. As has been stated this Court had already issued its mandate prior to the filing of the Motion to Reopen. Also in contrast to Jerry's Drive In, the Board accepted jurisdiction in this case and ruled upon the motion to reopen after entry of judgment.

In Standard Products Company, the filing of a motion to reopen after the issuance of the Court of Appeals mandate, and prior to the Circuit Judge's judgment in conformity with the mandate, was upheld. The Company attempts to distinguish Standard Products Company from the instant case on the basis that the Circuit Court had affirmed the Board award and when the mandate of the Court of Appeals affirming the Circuit Court was issued, there was no more

action for the Circuit Court to take. The Company's analysis is clearly erroneous.

In upholding the validity of the motion to reopen filed after issuance of the mandate in Standard Products Company, this Court did not validate the motion on the basis that the Circuit Court had affirmed the Board's award. Clearly the validity of the motion to reopen was upheld because it had been filed after the mandate was issued. Certainly this reasoning is supported by the Court's holding in Standard Products Company that the motion to reopen filed prior to the issuance of the mandate was untimely.

Plainly, the holding in Jerry's Drive-In, Inc. and Standard Products Company support Radford's argument that the motion to reopen filed after the issuance of the Court of Appeals mandate was timely. When these two cases are read with RAP 1.340 this argument is further buttressed. RAP. 1.340 provides clear language directing the filing of the mandate in the Circuit Court. The Company's argument might be tenable if the mandate directed the compilation of further evidence on the part of the Circuit Court rather than the remedial task of issuing a judgment affirming the Board's award. The Circuit Court clearly has no discretion in the issuance of that judgment in this case.

While recognizing that the holding in Seidl v. Willen, Ky., 411 S.W.2d 29 (1967) established the policy of the Court that appeals in Workmen's Compensation cases should be a one-

package appeal and include all issues, the Company has still processed this appeal in a piecemeal fashion. The issue raised here is a purely procedural issue which could have been raised in a one-package appeal from the decision of the Board in granting Radford's motion to reopen. In Seidl, this Court clearly stated:

"Compensation proceedings, unlike suits based on negligence for death, disability, and pain, are intended to take care of lost or disabled industrial workers and 'their dependents', and it is important to society that such proceedings be determined speedily and expeditiously without multiplicity of action or remedy. In the event a disabled worker or his dependents must, as in this case, await the trial of his claim by piecemeal through the Circuit Court and then through this Court on every objectionable order of the Board, regardless of the element of finality, great hardship may result. We consider it a better policy that all the issues be determined by the Board in its final order and a one-package appeal provided therefrom." 411 S.W.2d at 31

If this Court were to render a decision favoring the Company's analysis here, then that sort of piecemeal litigation contemplated in Seidl would result. The entire process of bringing a workmen's compensation claim to finality would be extended even further and parties to these claims would have found a new method for delay.

CONCLUSION

The Company's contention that Radford's motion to reopen after the issuance of this Court's mandate was untimely and that the

Board erred in sustaining that motion after the issuance of the Circuit Court's judgment is unsupported by the cases that it cites. Moreover, both Jerry's Drive-In, Inc., *supra* and Standard Products Company, *supra* support Radford's argument that his motion was timely filed and that the Board exercised proper discretion in granting that motion.

Finally, this Court's decision in Seidl, *supra*, is squarely against the piecemeal appeal brought by the Company in this case. Any deviation from the policy set forth in Seidl would cause a greater proliferation of workmen's compensation appeals and further delay the finality of a workmen's compensation claim weakening the purpose of the Act, which was designed to aid workmen injured on their job.

For the foregoing reasons the Appellee, Massar Radford, respectfully submits that the judgment of the Jefferson Circuit Court should be affirmed and the order of the Workmen's Compensation Board on Appellee's motion to reopen should also be affirmed in accordance with that judgment.

Respectfully submitted,

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